

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the matter of)	
)	
Applications of Comcast Corporation,)	MB Docket No. 10-56
General Electric Company and NBC)	
Universal, Inc. for Consent to Assign)	
Licenses or Transfer Control of)	
Licenses)	
)	
Media Bureau Seeks Comment on)	
Whether Comcast-NBCU Benchmark)	
Condition Needs Clarification and)	
Whether a Proposed Third Protective)	
Order for Compliance Should be)	
Adopted)	

COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge (PK) writes to generally support Project Concord, Inc.'s (PCI) position¹ regarding the disclosure of peer programming agreements. PK agrees that the disclosure Comcast-NBCUniversal asks for is not necessary to assure Comcast-NBCU's compliance with the benchmark condition of its merger.

The purpose of the benchmark condition is to protect the "future development of online video distribution,"² and to "guarantee *bona fide* online distributors the ability to obtain Comcast-NBCU programming in appropriate circumstances."³ To achieve this, the Commission has decided that "once an OVD [online video distributor] has entered into an arrangement to distribute programming from one

¹ Letter from PCI to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Mar. 15, 2012).

² Applications of Comcast Corporation, General Electric Company and NBC Universal, *Order*, 26 FCC Rcd. 4238, ¶ 7 (2011).

³ *Order* ¶ 4.

or more Comcast-NBCU peers,” it will “require Comcast-NBCU to make comparable programming available to that OVD on economically comparable terms.”⁴ In the event of a dispute, the Commission has adopted “baseball-style” arbitration: Comcast-NBCU and an OVD will both submit their final proposals to an arbitrator, who then picks the one that is most similar to a peer agreement.

Comcast-NBCU appears concerned that in any negotiations leading up to arbitration it will be operating at a disadvantage, since the OVD will know the contents of its peer agreements, while Comcast-NBCU will not. It therefore has asked the FCC to require that any OVDs that wish to take advantage of the condition first turn over any relevant peer agreements, in their entirety.⁵ It wants OVDs to turn over these agreements even before arbitration begins and, unprecedentedly, it has asked the Bureau to allow Comcast-NBCU employees, executives, and other competitive decision-makers to review this highly confidential material.

Leaving aside for a moment the competitive and confidentiality concerns,⁶ there is little justification for requiring an OVD to turn over peer agreements. As PCI has observed, Comcast is a sophisticated negotiator that almost certainly has superior knowledge of market practices and rates compared to any given OVD. It is unlikely that one piece of information that an OVD might have would change its negotiating position one way or the other or somehow trick it into entering into economically unsustainable deals. Instead, the likely effect of required disclosure would be to

⁴ *Order* ¶ 88.

⁵ *See* Letter from Comcast-NBCU to William Lake, Chief, Media Bureau, MB Docket No. 10-56 (Feb. 17, 2012).

⁶ These concerns have already been voiced by many companies in this docket. *See* Letter from Content Interests to William Lake, Chief, Media Bureau, FCC (Feb. 27, 2012).

limit, not enhance, online distribution. Peer agreements should be a floor and not a ceiling. If Comcast is permitted to review peer agreements before submitting its final offer it would likely tailor its offer to closely match them. The purpose of the arbitration, which uses peer agreements as a benchmark by which to determine which parties' offers are most fair, is only to hold Comcast to a minimum standard of conduct. The Bureau should not adopt procedures that would make Comcast-NBCU less likely to offer *more* favorable terms to OVDs.

Thus, the Bureau does not need to craft a new kind of protective order to satisfy Comcast-NBCU's desire to review its competitor's programming contracts. Rather, in line with its Model Protective Order, it can adopt procedures for the limited disclosure of some terms of peer programming contracts during arbitration to help the arbitrator decide which party's terms are closest to being economically equivalent to peer programming agreements.

The Commission cannot put OVDs in an impossible position. OVDs ought to be able to both honor their peer programmer's desire to keep confidential information out of the hands of competitors, and still take advantage of the benchmarking condition. It can do this by allowing OVDs to submit redacted versions of their peer agreements to the arbitrator. The unredacted agreements are immaterial: The purpose of the arbitration is to ensure that Comcast-NBCU's proposed terms are "economically equivalent" to the peer programmer's terms, not word-for-word identical. In general PK supports transparency and disclosure in FCC proceedings, and often applicants before the FCC—including Comcast—take far too many

liberties when they redact or mark as confidential material in their submissions.⁷ But in this case, OVDs are not the applicants. The applicants remain Comcast-NBCU. OVDs should not be subject to the heightened scrutiny that is appropriate for companies that are attempting to demonstrate that a proposed transaction or regulatory change is in the public interest; rather, they are simply trying to take advantage of a process that the Commission has already set up to benefit the public interest. It is therefore proper for the Commission to permit OVDs, in arbitration, to redact all but the particular terms of a peer agreement that are in dispute. Those terms would then be viewed only by the arbitrator and, at most, Comcast-NBCU's outside counsel or experts. There will be predictable disputes over redactions and related matters, but these can be handled by the arbitrator's power to "determine allowable discovery and permissible evidence,"⁸ rather than by forward-looking Bureau decisions.

Finally, the Commission should take seriously the possible consequences of requiring full disclosure of peer agreements to Comcast-NBCU. OVDs that submitted their agreements for such review could find themselves shut out of future agreements with other programmers, or even taken to court. Explicitly or implicitly, peer programmers would warn OVDs that trying to use the benchmark condition is unacceptable. And Comcast-NBCU could use the information it gleans from the agreements to further cement its market dominance. Although Comcast-NBCU

⁷ See Letter from Media Access Project, Free Press, Public Knowledge, and Greenlining Institute to Marlene H. Dortch, Secretary, FCC, WT Docket 12-4 (Feb. 7, 2012); Letter from Public Knowledge to Julius Genachowski, Chairman, FCC, WT Docket No. 11-65 (Oct. 4, 2011).

⁸ *Order* Appendix A, Part VII(C), ¶ 4.

assures the Bureau that its employees will “use the information solely for purposes of responding to a specific OVD’s request,”⁹ the Commission’s practice of granting “Second Protective Orders” that limit the disclosure of information to outside counsel and experts confirms that it is unrealistic to assume that people who have learned information in one context can ignore it in another. As many companies have observed,¹⁰ even *inadvertent* disclosure or use of confidential information can be detrimental. By no account should Comcast be given access to valuable and competitively sensitive information as a payment to induce it to comply with its merger conditions.

The Department of Justice has noted that among the costs of post-merger behavioral remedies like the benchmarking condition are “efforts by the merged firm to evade the remedy’s ‘spirit’ while not violating its letter.”¹¹ This appears to be happening here, as Comcast-NBCU seeks to avoid complying with its merger conditions by making extreme procedural demands. The Commission should instead clarify the process by which an OVD can submit redacted documents in the context of arbitration.

Respectfully submitted,

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PUBLIC KNOWLEDGE

April 3, 2012

⁹ *Comcast-NBCU Letter* at 4.

¹⁰ *See, e.g.*, Letter from EchoStar to Marlene H. Dortch, Secretary, FCC, CS Docket No. 01-348 (Apr. 22, 2002).

¹¹ DEPARTMENT OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7-8 (2004).